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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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No.

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ANNE C. BELL, Petitioner

vs.

LOWRY M. BELL, JR., Respondent

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

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## QUESTIONS PRESENTED

1. Whether the termination of petitioner's support payments ordered under a judgment of divorce solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis violates petitioner's rights of association and privacy guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

2. Whether, in terminating petitioner's support payments ordered under a judgment of divorce solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis, the court below created a classification with no rational relationship to any legitimate state

objective in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

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## OPINIONS BELOW

The findings of fact and conclusions of law of the Probate Court for the county of Norfolk, which dismissed petitioner's complaint for contempt, are unreported and are appended hereto at p. A-44. The opinion of the Court of Appeals for the Commonwealth of Massachusetts, which reversed the judgment of the Probate Court, is officially reported at 16 Mass.

App. Ct. 188 and is unofficially reported at 459 N.E.2d 109 (1983), and is appended hereto at p. A-19. The opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts, which affirmed the judgment of the Probate Court, is officially reported at 393 Mass. 20 and is unofficially reported at 468 N.E.2d 859 (1984), and is appended hereto at p. A-1.

STATEMENT OF JURISDICTIONAL GROUNDS

(i) Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Supreme Judicial Court for the Commonwealth of Massachusetts made and entered on September 13, 1984, and appended hereto at p. A-65.

(ii) Petitioner filed no petition for a rehearing in the court below and made no application for an extension of time within which to petition for

a writ of certiorari.

(iii) (not applicable)

(iv) The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Fourth, Ninth and section one of the Fourteenth Amendments to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Ninth Amendment provides:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This case has its genesis in a judgment of divorce entered in the Probate Court for the county of Norfolk, Massachusetts, on April 28, 1976, nunc pro tunc November 28, 1975, when petitioner and respondent were divorced after twenty-six years of marriage

(R. 5-6).[1] The judgment of divorce, by reference to an agreement of the parties, ordered that respondent make significant monthly alimony payments to petitioner for a period of fifteen years, or until the happening of any one of several contingencies, including petitioner's living together with a member of the opposite sex, so as to give the outward appearance of marriage (R. 12). For convenience, this contingency provision is hereafter sometimes referred to as the "outward appearance clause".

In a four-to-three decision, the Massachusetts Supreme Judicial Court interpreted this outward appearance clause to apply to petitioner's "sharing a bedroom with a man on a regular basis

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[1]Unless otherwise indicated, references are to the printed record submitted in the Appeals Court below as an "Appendix to the Briefs".

for approximately three years," and held that petitioner has thereby forfeited her right under the judgment of divorce to alimony. Bell v. Bell, 393 Mass. 20, 22, 468 N.E.2d 859, 861 (1984) (Appendix, appended hereto, at p. A-6). Petitioner claims that this construction and application of the outward appearance clause violates her federal constitutional rights to privacy and freedom of association and to equal protection and due process of the laws. The Massachusetts Supreme Judicial Court expressly declined to consider petitioner's federal constitutional claims on the ground that those claims were not seasonably raised. Petitioner recognizes that as a general rule failure to raise a federal question at the stage of proceedings required by state law precludes review by this Court. However, this case falls within

exceptions to this general rule.

Whether a federal question has been sufficiently and timely raised in a state court is itself a federal question that this Court can decide for itself. Street v. New York, 394 U.S. 576, 583 (1969); Douglas v. Alabama, 380 U.S. 415, 420-423 (1963). As a matter of federal law, it is well-established that a federal claim was timely raised if the ruling of the state court could not reasonably have been anticipated and the federal claim was raised at the earliest opportunity. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980); Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 677-678 (1930); Missouri ex rel. Missouri Ins. Co. v. Gehner, 281 U.S. 313, 320 (1930); Saunders v. Shaw, 244 U.S. 317, 320 (1917). In this case, the construction given the outward appearance clause

by the State Supreme Judicial Court was unforeseeable and indefensible by reference to prior Massachusetts decisions.[2]

Petitioner is well aware that this Court has no power to revise the judgment of the Massachusetts Supreme Judicial Court on questions of state law. The following discussion of Massachusetts substantive law is necessary to show that the construction given the outward appearance clause by the court below was unforeseeable, in support of petitioner's view that, as a matter of federal law, her federal constitutional claims were seasonably raised in the state court.

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[2]Neither party advocated the construction given to the clause by the court below. Nor was such a construction adopted by any judge who had interpreted the outward appearance clause previously in the course of this litigation.

While there is no prior Massachusetts decision involving a provision for the termination of alimony identical to the outward appearance clause herein, there are numerous decisions dating back to the last century involving the termination of alimony payments on account of the "remarriage" of the woman, which remarriage had in most of the cases been annulled. In all of the cases where alimony was ordered terminated, the ratio decidendi was either that, as a result of the remarriage, the woman had acquired a right to be supported by another man, Glazer v. Silverman, 354 Mass. 177, 179 (1968); Southworth v. Treadwell, 168 Mass. 511, 513 (1897) or that termination of alimony payments was equitable under the particular circumstances of the case, Surabian v. Surabian, 362 Mass.

342, 348 (1972); Gerrig v. Sneirson, 344 Mass. 518, 520-521 (1962). In two other cases, the court found that the circumstances relating to the wife's need for support had not changed as a result of her remarriage, and so refused to modify its order for alimony. Robbins v. Robbins, 342 Mass. 247, 252 (1961); Ziegler v. McKinlay, 318 Mass. 765, 767 (1945).

Any doubt that the dispositive criteria in Massachusetts in cases involving termination of alimony payments have been support and other equitable considerations is eliminated by Heistand v. Heistand, 384 Mass. 20 (1981). In Heistand, the Supreme Judicial Court summarized the applicable law as follows:

> Because the law of New York entitled the wife to support from her second husband after annulment of her remarriage, this

> court in Glazer[3] deemed it inequitable to allow the wife to receive support from two husbands. Id. at 180. In that case this court also evaluated a ceremonial, invalid marriage according to its effect on third parties. Id. at 178. This court declined to hold a husband liable for alimony where he was entitled to rely on the apparent validity of his former wife's remarriage. . . . Neither of the criteria dispositive in Glazer -- double support or third-party reliance -- is evidence on the record before us. Heistand v. Heistand, 384 Mass. 20, 24-25 (1981).[4]

Thus there is ample precedent in Massachusetts decisions for resolving disputes relating to the termination of alimony payments to women who had re-

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[3]Glazer v. Silverman, 354 Mass. 177 (1968).

[4]The Supreme Judicial Court reached this conclusion in spite of undisputed evidence that the woman participated in a symbolic marriage ceremony, exchanging vows and sending out printed announcements and the man she "married" thereafter moved into her house & paid her former husband the $15,000 by which the woman acquired full title to the house. Id. at 22.

married or who had formed a "'spousal-oriented' relationship," Id. at 24, by weighing support and other equitable considerations. This has been the rule whether the case arose as a contract action based upon an agreement of the parties or as a contempt or modification proceeding based upon the judgment of divorce.

Need for support has also always been an essential consideration in Massachusetts in regard to an award of alimony; adultery or other misconduct of the wife, standing alone, has never been sufficient grounds to deny alimony. Graves v. Graves, 108 Mass. 314, 317-318 (1871); Clifford v. Clifford, 354 Mass. 545, 548 (1968). Over the last century Massachusetts courts have evolved to the view that "(o)rdinarily matters such as custody, support and alimony are not

affected by such general considerations as the relative moral rectitude of the spouses or which spouse is awarded the divorce." Davisson v. Davisson, 12 Mass. Ct. App. 420, 425 N.E.2d 762, 765 (1981), further app. review denied, 425 N.E.2d 762 (Mass. 1981). See also Partridge v. Partridge, 14 Mass. App. Ct. 901, 919 (1982), wherein the Appeals Court reversed an order denying alimony to a woman who was living with a male companion, because the Appeals Court found ". . . no indication of the amount of support provided the wife by her companion or whether it constitutes a dependable financial resourse." Id. at 919.

The construction given the outward appearance clause by the court below represents a radical departure from prior Massachusetts law in a second

important respect. Since 1840 Massachusetts has had a statute which provides in pertinent part that "(m)arriage may be proved . . . by evidence of general repute or of cohabitation of the parties as married persons . . ." Mass. Gen. Laws Ann. c. 207, §47. Decisions under this statute make it clear that "cohabitation as married persons" has always been distinguished in Massachusetts from "illicit" or "meretricious" cohabitation. Riley v. Murphy, 265 Mass. 420 (1929); Edwards v. Cockburn, 264 Mass. 112 (1928); Finer v. Steuer, 225 Mass. 611 (1926); Meyers v. Pope, 110 Mass. 314 (1872); Loring v. Thorndike, 87 Mass. 257 (1862). In all of these decisions, there was a holding out as man and wife by the cohabitants and/or a recognition of their relation as husband and wife by

family, friends and the general community. See also, Newburyport v. Boothbay, 9 Mass. 414 (1812). For example, in Riley v. Murphy, 265 Mass. 420 (1929), the factors relied upon by the court in finding that the parties' cohabitation evidenced marriage included the woman's holding herself out as the man's wife, her use of his surname on her bank accounts, and the couple's consistent reputation as husband and wife amongst their family, their neighbors and the community.

In Edwards v. Cockburn, 264 Mass. 112 (1928), the Supreme Judicial Court stated:

> Mere cohabitation of a man and woman alone is not, under the statute, evidence of marriage. They must so cohabit "as married persons", and not live together merely in illicit intercourse. Id. at 125.

In regard to evidence of reputation of

marriage, the court further stated:

> . . .(T)he weight of such evidence is to be determined to a great degree by the standards of living and the character of the people in the community. There was evidence that, when Crabtree and Annie Leopold were living in Tombstone, many men and women were living there together who were not married, and that fact was generally known. In such circumstances evidence of repute that a man and woman who were living together were married might be entitled to less weight than would be given to similar evidence in a community where correct standards of conduct were more strictly observed. Id. at 126.

If cohabitation in "illicit intercourse" in Tombstone, Arizona in 1881 was not treated as cohabitation "as married persons" by the Supreme Judicial Court in 1928, petitioner could not reasonably be expected to anticipate the holding of the Supreme Judicial Court in this case that sharing a bedroom with a man in Boston in the 1980's on a

regular basis constitutes an outward appearance of marriage. It may not reasonably be held that petitioner was bound to anticipate such a construction, and thus raise federal constitutional challenges to the outward appearance clause at the outset of this litigation. For this reason, the ruling of the court below that petitioner's constitutional claims were not seasonably raised presents no bar to the exercise of certiorari jurisdiction by this court.[5]

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[5]The circumstances of this case satisfy the requirement that federal claim be raised at the earliest opportunity. The federal questions which petitioner asks this court to review were briefed and argued before the Massachusetts Supreme Judicial Court. See, Supplemental Brief of the Appellant to the Supreme Judicial Court at pp. 9-17. See also, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 85 n. 9 (1980) (federal constitutional claim first raised before State Supreme Court in brief in response to amici curiae briefs.

Massachusetts' state procedural rule should not bar review of petitioner's federal constitutional claims for an additional reason. The Massachusetts Supreme Judicial Court declined to consider petitioner's constitutional claims, although possessed of power to do so under state law. This Court stated the federal rule in Williams v. State of Georgia, 349 U.S. 375 (1955):

> A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. Id. at 383.

See also, Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), where the state court had denied the petitioners' state appeals because of their failure to comply with a state rule of appellate procedure, and this Court granted review because the state

court had not:

> . . .so consistently applied its notice requirement as to amount to a self-denial of the power to entertain the federal claim here presented if the Supreme Court of Appeals desires to do so. See Henry v. Mississippi, 379 U.S. 443, 455-457, . . . (Black, J., dissenting). Such a rule, more properly deemed discretionary than jurisdictional, does not bar review here by certiorari. Id., 396 U.S. at 234.

The Massachusetts Supreme Judicial Court declined to consider petitioner's constitutional claims in spite of well-established Massachusetts law that an agreement violative of some fundamental principle of public policy will not be enforced by the Supreme Judicial Court, even though the issue of the legality of the agreement was not raised below. O'Donnell v. Bane, 385 Mass. 114, 117 (1982) (dictum); Gleason v. Mann, 312 Mass. 420, 422 (1942); Reuter v. Ballard,

267 Mass. 557, 563 (1929). There can be no question that individual rights guaranteed by the Constitution of the United States express fundamental principles of public policy. The Supreme Judicial Court has applied the well-established rule that an agreement violative of a fundamental principle of public policy will not be enforced in a case involving an agreement argued to be in restraint of marriage. Gleason v. Mann, 312 Mass. 420 (1924). Nor will agreements which include sexual intercourse or cohabitation as part of the consideration be enforced as against public policy. Green v. Richmond, 369 Mass. 47 (1975); Zytka v. Dmochowski, 302 Mass. 63 (1938). Thus, the fact that the Supreme Judicial Court declined to entertain petitioner's constitutional claims, while treating kindred issues

differently, does not bar review by this Court.

Finally, the fact that the court below was applying a provision in a judgment of divorce, incorporated by reference to an agreement of the parties, does not insulate that court's judgment from constitutional scrutiny. A transgression of constitutional rights "is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [cite omitted] state statute." Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930). Here, the court below accomplished the transgression in the course of construing and enforcing an otherwise valid provision in a judgment of divorce.

Under Massachusetts law, a judgment for divorce providing for alimony "does not rest upon the agreement of the

parties," but rather rests upon the court's statutory authority. Surabian v. Surabian, 362 Mass. 342, 346 (1972) (provision in parties' agreement for termination of alimony upon remarriage of wife incorporated in divorce judgment). In determining the effect of a termination provision incorporated in a judgment of divorce by reference to an agreement, "it is the court's intention which must be ascertained." Id. at 347. Furthermore, an agreement between the parties will not be enforced in a contempt proceeding unless "a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement . . . was fair and reasonable at the time of entry of the judgment nisi. . ."[6]

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[6]Under Massachusetts law a separation agreement does not stand "upon the same footing in all respects as ordinary contracts. . ." Bailey v. Dillon, 186 Mass. 244, 247 (1904). Nor is the freedom of parties "to limit or waive their legal

Knox v. Remick, 371 Mass. 433, 436 (1976). See also, Dominick v. Dominick, 18 Mass. App. Ct. 85, 92, further app. review denied, 392 Mass. 1103 (1984).

Neither petitioner nor respondent ever argued that petitioner's sleeping arrangement, standing alone, was a sufficient basis to find an "outward appearance of marriage." That view of the outward appearance clause originated with a bare majority of the court below. There is absolutely nothing in the record of this case to suggest that petitioner ever agreed to a termination of her alimony payments in the event she should share a bedroom with a man on a regular basis. Petitioner agreed to a termination of support if her living arrangement gave an

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[6](cont.) rights in the event of a divorce . . . appropriately left unrestricted." Osborne v. Osborne, 384 Mass. 591, 599 (1981).

"outward appearance of marriage." As the dissenters in the court below observed, sharing a bedroom is a private matter and presents no outward appearance of anything. Bell v. Bell, 393 Mass. 20, 25, 468 N.E.2d 859, 862 (1984) (Wilkins, J., dissenting, with whom Liacos and Abrams, JJ., join) (Appendix appended hereto at A-12).[7]

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[7]See also, Commonwealth v. Catlin, 10 Mass. 8 (1803), wherein an indictment for "open gross lewdness and lascivious behavior" was dismissed, because the testimony of witnesses who had observed the defendant in bed with a woman in a very familiar situation on separate occasions proved nothing more than secret or private lewdness and lascivious behavior. (emphasis in original)

## REASONS FOR GRANTING THE WRIT

This case squarely presents an important question of federal law which has not been, but should be, settled by this Court. That question is whether termination of alimony payments based exclusively on a divorced woman's post-divorce intimate association[8] with an

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[8]The right at issue in this case is appropriately characterized as a right to "intimate association". This case does not concern sexual behavior per se but an inference of sexual behavior based wholly upon the sharing of a bedroom. In the course of petitioner's testimony at the contempt hearing, covering 62 pages of the trial transcript, there were only two questions that could conceivably be characterized as touching upon the intimate or private aspects of petitioner's association. After establishing that the apartment shared by petitioner consists of a living room and a bedroom, counsel for respondent inquired of petitioner:

"Q. You sleep in the bedroom?
A. Yes.
Q. And does J.R. sleep in the bedroom?
A. Yes." (R. 70)

The construction of the outward appearance clause by the court below rests exclusively on this testimony.

unrelated man violates that woman's rights to privacy and freedom of association and to due process and equal protection of the laws guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

1. This is an appropriate case for an extension of the right to privacy first articulated in Griswold v. Connecticut, 381 U.S. 479 (1965). In Griswold, this Court struck down a state statute which prohibited the use of contraceptives as an unconstitutional infringement of "an intimate relation of husband and wife," Id. at 482. Justice Douglas, writing for the majority, stated:

> Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of

> privacy surrounding the marriage relationship. Id. at 485-486.

Subsequently this Court recognized the constitutionally protected right of an individual "to satisfy his intellectual and emotional needs in the privacy of his own home." Stanley v. Georgia, 394 U.S. 557, 565 (1969) (state obscenity statute, insofar as it punished mere private possession of obscene matter, violated First Amendment).

In Eisenstadt v. Baird, 405 U.S. 438 (1972), this Court, relying upon Griswold, held that a Massachusetts statute which barred the distribution of contraceptives to single persons violated the equal protection clause of the Fourteenth Amendment. Justice Brennan, writing for the majority, indicated that the zone of privacy articulated in Griswold protects single persons in

regard to fundamental decisions, as follows:

> It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557 . . . (1969). Id. at 453.

See also, Roe v. Wade, 410 U.S. 113 (1973) (right of personal privacy extends to the decision by a single woman whether to have an abortion).

This case squarely presents governmental intrusion into petitioner's intimate conduct within the privacy of her own home. Because the court below chose to focus exclusively on that

conduct, this case lends itself to a reasonably narrow extension of the right of privacy and freedom of association to the intimate and unobstrusive association of single adults within the privacy of their own homes.

2. The question whether any federal constitutional restraints come into play when continued payment of alimony pursuant to a judgment of divorce is conditioned on the recipient's foregoing certain intimate associations presses for an answer. A majority of the state courts of last resort have rejected the view of the court below that court-ordered alimony payments may be terminated based solely upon a recipient's intimate associations or relations.[9]

[9] See, Byrd v. Byrd, 252 Ark. 202, 478 S.W.2d 45 (1972); Husband B.W.D. v. Wife B.A.D., 436 A.2d 1263 (Del. 1981) (equally-divided court); Alibrando v. Alibrando, 375 A.2d 9 (D.C. Ct. of App.

Only one other state court of last resort had been found that has adopted the extreme minority view of the court below.[10]

State legislatures, on the other hand, have enacted statutes that appear, at least on their face, to represent a servious intrusion of government in the private lives of divorced individuals.[11]

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[9] 1977); Daniels v. Daniels, 82 Idaho 210, 351 P.2d 236 (1960); Fleming v. Fleming, 221 Kan. 290, 559 P.2d 329 (1977); Mitchell v. Mitchell, 418 A.2d 1140 (Me. 1980); Abbott v. Abbott, 282 N.W.2d 561 (Minn. 1979); Bowman v. Bowman, 163 Neb. 336, 79 N.W.2d 554 (1956); Gayet v. Gayet, 92 N.J. 149, 456 A.2d 102 (1983); Brister v. Brister, 92 N.M. 711, 594 P.2d 1167 (1979); Stallings v. Stallings, 36 N.C. App. 643, 244 S.E.2d 494 (1978); Wolfe v. Wolfe, 46 Ohio St. 399, 350 N.E. 2d 413 (1976); Myhre v. Myhre,269 N.W.2d 905 (S.D. 1980); Wight v. Wight, 284 S.E.2d 625 (W. VA. 1981); Van Gorder v. Van Gorder, 110 Wis.2d 188, 327 N.W.2d 674 (1983).

[10] See, McRae v. McRae, 381 So.2d 1052 (Miss. 1980); Rubisoff v. Rubisoff, 242 Miss. 225, 133 So.2d 534 (1961).

[11] See, Alabama Code §30-2-55 (1983)

In addition, these statutes, like the decision of the Court below, create an arbitrary classification wholly without rational basis. It is only the economically disadvantaged spouse whose intimate relations and associations are constrained, irrespective of the impact of those associations upon the economic need of that spouse. Four state

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("living openly or cohabiting with a member of the opposite sex" requires termination of alimony); Georgia Code Ann. §30-220 (b) (1980) ("dwelling together continuously and openly in a meretricious relationship with a person of the opposite sex" shall be grounds to modify provisions for alimony); Pennsylvania Stat. Ann. tit. 23, §507 (Purdon Supp. 1984-1985) (where recipient of alimony "has entered into cohabitation with a person of the opposite sex" subsequent to divorce, alimony terminated); Utah Code Ann. §30-3-5 (3) (Supp. 1983) ("residing with a person of the opposite sex" requires termination of alimony unless established by recipient of alimony "that the relationship or association between them is without any sexual contact").

statutes challenged on federal constitutional grounds based upon the Equal Protection and Due Process Clauses have been upheld by state courts on various grounds.[12] No reported decision has been found wherein a state court considered a federal constitutional challenge based upon the rights to privacy and freedom of association.[13]

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[12]See, Ivey v. Ivey, 378 So.2d 1151, 1152 (Ala. Civ. App. 1979) (challenge to Ala. Code §30-2-55 on equal protection grounds dismissed as "too nebulous" for court's understanding); Sims v. Sims, 245 Ga. 680, 266 S.E.2d 492 (1980) (Ga. Code Ann. §30-220(b) upheld as rational classification which furthers legitimate governmental objectives); Hall v. Hall, 82 Misc.2d 814, 372 N.Y.S.2d 344 (Fam. Ct. 1976), affirmed mem., 55 A.D.2d 752, 389 N.Y.S.2d 448 (3rd Dept. 1976) (N.Y. Dom. Rel. Law §248 makes a rational distinction between persons living in a temporary liaison and those living together in a more permanent relationship); Roberts v. Roberts, 657 P.2d 153, 155 (1983) (three judges dissenting ) (Okla. Stat. Ann. tit. 12, §1289(D) not violative of equal protection and due process as requires proof of change in need for support or ability to support).

[13]A number of commentators have

What effect the cohabitation of an alimony recipient has on the obligation of the payor is primarily a matter for state courts and legislatures. But there is a need for constitutional restraint on governmental intrusion in this area. A recognition that the federal constitution places a limit on governmental intrusion into the intimate

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[13]suggested that termination of alimony based upon the recipient's cohabitation constitutes a violation of constitutionally protected privacy, as well as a violation of the Equal Protection Clause. See, Note, "Alimony, Cohabitation and the Wages of Sin: A Statutory Analysis", 33 Ala, L. Rev. 577, 608-612 (1982) (Ala. Code §30-2-55 may be unconstitutional); Strickman, "Marriage, Divorce and the Constitution", 22 Boston College L. R. 935, 991 (1981); Note, "Domestic Relations: Oklahoma's Live-In Lover Statute: §1289(D) of Title 12", 36 Okla. L. Rev. 906, 914-915 (1983) (Oklahoma statute unconstitutional); Comment, "The Effect of Third Party Cohabitation on Alimony Payments", 15 Tulsa L. J. 772, 773 n, 6 (1980); Note, Alimony Modification: Cohabitation of Ex-Wife with Another Man, 7 Hofstra L. Rev. 471, 494-496 (1979) (N.Y. Dom. Re. Law §248 unconstitutional).

associations of divorced persons will affect contruction of existing state statutes, as well as affect the drafting of new legislation. It will also have an immediate and far-reaching impact upon the drafting of agreements between the parties to a divorce proceedings.[14]

3. The primary beneficiaries of federal constitutional protection will be women, divorced after long-term marriages, who, because of their fulltime homemaking roles, have the least opportunity to achieve financial independence

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[14]Domestic relations form books generally suggest inclusion of a clause in a separation agreement providing for termination of alimony upon cohabitation. Examples of suggested language are: "cohabitation with another person with whom she has a romantic relationship," S. Green and J. Long, Marriage and Family Law Agreements, 372-373 (1984); and "(c)ohabitation with a person of the opposite sex without marriage shall be deemed a remarriage," J.F. Lombard, Family Law §1309 (West. Supp. 1984).

and thus require support over a significant period of time.[15] The

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[15]Petitioner and respondent were married for twenty-six years and have two adult children (R.1.). At the time of their divorce, respondent was an executive with a major corporation; he has since remarried (R.153). At the time of the contempt hearing, petitioner was sharing a two-room apartment and was collecting unemployment compensation (R.34,69).

Statistical studies belie the assumption that a choice of cohabitation rather than remarriage is made to avoid provisions for termination of alimony upon remarriage. See, Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," 28 U.C.L.A. L. Rev. 1181, 1221-1226 (1982). Opportunity for remarriage is largely a function of a woman's age at the time of her divorce. A woman forty or older has a 28% chance of remarriage, while a woman under thirty has a 75% chance of remarrying. Id. at 1229. One study found that, in a group of individuals married 18 or more years, 36% of the men had remarried within a year after the divorce compared to 6% of the women. An additional 10% of the men and 6% of the women had a permanent cohabitant in their post-divorce household. Weitzman and Dixon, "The Alimony Myth: Does No-Fault Divorce Make a Difference?," 14 Family Law Quarterly 141, 177 (1980).

transition of these women from marriage to independence is difficult enough without the intrusion of the state into their intimate associations.[16] Divorced women must be permitted to seek intimate associations within the privacy of their own homes freed of the threat of forfeiture of their economic support and secure in their fundamental and equal rights to privacy and association.

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[16]The social and emotional difficulties faced by women divorced after long-duration marriages are detailed in Journal of Geriatric Psychiatry, Vol. 15, no. 2 (1982); in Ruth Harriet Jacobs, Life After Youth (1979); and in U.S. House of Representatives Select Committee on Aging, Women in Midlife - Security and Fulfillment, Vol. 1 (1979).

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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84-955

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

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No.

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ANNE C. BELL, Petitioner,

vs.

LOWRY M. BELL, JR., Respondent

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APPENDIX

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N-3323

SUPREME JUDICIAL COURT
Norfolk, January 11,1984
--September 13, 1984

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

Present: Hennessey, C.J.,
Wilkins, Liacos, Abrams,
Nolan, Lynch & O'Connor, JJ.

O'CONNOR, J. The plaintiff appealed to the Appeals Court from the dismissal of her contempt complaint against her former husband for his failure to continue support payments allegedly owed to her under a judgment of divorce. The Appeals Court, by a two-to-one decision, reversed the judgment of the Probate Court. Bell v. Bell, 16 Mass. App. Ct. 188, 197 (1983). We granted the defendant's application for further appellate review. We affirm the judgment of the Probate Court.

The judgment of divorce was entered on April 28, 1976, effective as of

November 28, 1975. It incorporated a separation agreement that provided in part that the defendant would make significant monthly alimony payments to the plaintiff for a period of fifteen years following the entry of a final judgment of divorce or until the "happening of the following contingencies: 1) the (w)ife's death, 2) the (w)ife's remarriage, and/or 3) the (w)ife's living together with a member of the opposite sex, so as to give the outward appearance of marriage at any time prior to May 1, 1981, whichever of the . . .three contingencies happens first." The controversy concerns the interpretation and application of the third contingency provision (cohabitation clause). After a trial of the contempt matter, the judge made written findings and rulings. Based on his subsidiary findings with respect to the conduct of the plaintiff,we conclude that she "liv(ed) together with

a member of the opposite sex, so as to give the outward appearance of marriage . . . prior to May 1, 1981.[1] It follows that the judge correctly ruled that the defendant's obligation to pay alimony had terminated and the contempt complaint was properly dismissed.

The judge found that following the judgment of divorce the plaintiff resided at the marital home in Cohasset on a regular basis until March, 1978. From March, 1978, until that summer she resided part of the time at the Cohasset home and part of the time in an apartment leased by a man identified as "J.R." From June,1978,

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[1]We consider the cohabitation clause to be unambiguous as applied to the facts of this case, and therefore we do not rely on parol evidence or on findings of the judge to determine the intent of the parties.

through October, 1979, she resided on a regular basis with J.R. in his apartment, and from October, 1979, to June, 1980, she resided with him at his apartment "for the most part." The judge also found that "(d)uring the period of time from June, 1978 through May, 1981, the plaintiff on a regular basis cohabited with J.R. . . . during which time they shared the same bedroom."

In addition, the judge made numerous detailed findings which we summarize briefly. The apartment lease stood solely in J.R.'s name. The plaintiff's name did not appear on the door or on the mailbox and she received her mail elsewhere. J.R. paid the rent and the plaintiff purchased the food and did most of the cooking and cleaning. Part of the furniture in the apartment was his and part of it was hers. They maintained separate bank accounts and never commingled assets. They took trips

together and divided the costs. They socialized together. The plaintiff never represented to anyone that she was married to J.R. She never used his surname.

The cohabitation clause in question allowed the termination of alimony payments in the event that the plaintiff lived with a man "so as to give the outward appearance of marriage." It focused on the possibility of the plaintiff's sharing a home with a man, and it contemplated that that might occur in either of two ways: in a way that would create the appearance that the plaintiff and the man were married, or in a way that would not create such an appearance. Clearly, the parties thought that a man and a woman could live together in a way that would normally be associated with being married without their actually being married and without claiming or acknowledging a marriage relationship. It is difficult to

conceive of what conduct the parties contemplated if that conduct did not at least include the plaintiff's sharing a bedroom with a man on a regular basis for approximately three years.

The Appeals Court held that it was the intention of the parties that alimony might be terminated only on the death or remarriage of the plaintiff, or "in circumstances so closely like marriage as to result in Mrs Bell acquiring significant actual support or a new right to support from a man prior to the specified date in 1981." Bell v. Bell, supra, at 194. The Appeals Court correctly noted that, in the absence of a formally solemnized marriage, the plaintiff could not become entitled to support from a man except by a contract providing for it. Id. at 192-193. Thus, in effect, the Appeals Court interpreted the separation agreement to provide for the termination of alimony in

less than fifteen years only if the plaintiff died or remarried or, irrespective of appearances, if she actually received significant financial support from a man other than the defendant, or entered into a contract for support.

The plain language of the agreement cannot properly be ignored. The clause in question does not mention support or the plaintiff's continuing need for it in the absence of a new source. It would have been relatively easy for the parties to have expressly provided for the termination of alimony in the event of the plaintiff's being substantially supported by another man or becoming contractually entitled to such support. There was no need to subtly express that thought by reference to the plaintiff's living with a man so as to give the outward appearance of marriage. The language is better suited, and we think was employed, to

provide for termination of the plaintiff's right to alimony if she were to remarry or were to live as though she were remarried.

In arriving at its interpretation of the cohabitation clause as relieving the defendant of his alimony obligation only if the plaintiff were to receive substantial support or were to become contractually entitled to receive support from another man, the Appeals Court relied in part on a provision in the separation agreement that "neither the (h)usband nor the (w)ife will hereafter interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint by the other." Bell v. Bell, supra at 194. The court reasoned that if the defendant were entitled to terminate alimony payments in response to the plaintiff's arrangement with J.R., the defendant could coerce the plaintiff's conduct in a way that was in-

consistent with the intent of the parties as expressed in their agreement. Id. at 194-195. It is true that the disputed clause, as we interpret it, might give the plaintiff reason not to live with a man so as to give the outward appearance of marriage. It is also true that the provision permitting a termination of alimony in the event of the plaintiff's remarriage might give her reason to decide against remarriage. We think, however, that it is clear that the parties did not intend by the noninterference provision to preclude the defendant from possibly influencing the plaintiff's choices by terminating alimony payments in the event she were to remarry or were to live with a man in the manner of a married couple. Termination of alimony payments in such circumstances cannot be considered interference with the plaintiff's personal liberty or "criticism or restraint" within the meaning of the

agreement.

Finally, the plaintiff argues that "(c)ohabitation clauses which operate to bar the receipt of support payments by the wife upon the commencement of a non-marital relationship with a man, unfairly discriminate against women, both pursuant to the equal protection clause of the United States Constitution and the Massachusetts Equal Rights Amendment." The plaintiff's argument challenging the constitutionality of the provision appears for the first time on appeal to this court. Because this argument was not raised below, we decline to consider it. See M.H. Gordon & Sons v. Alcoholic Beverages Control Comm'n, 386 Mass. 64, 73 (1982); Trimmer, petitioner, 375 Mass. 588, 592 (1978).

Judgment of the Probate Court affirmed.

WILKINS, J. (dissenting, with whom Liacos and Abrams, JJ., join). The opinion of the Appeals Court presents a reasonable interpretation of the separation agreement, certainly a view preferable to that expressed in the opinion of this court. The court's opinion gives no effect to the provision in the separation agreement that neither party will "interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint of the other." We would reverse the judgment of the trial court by focusing on the crucial language of the separation agreement, and would thus ignore the details of the private arrangements between Mrs Bell and J.R. that have influenced the opinion of this court and the majority and dissenting opinions of the Justices of the Appeals Court.

The question for decision is what the

parties meant by the phrase "(3) (the w)ife's living together with a member of the opposite sex, so as to give the outward appearance of marriage at any time prior to May 1, 1981 . . . ." We know that the wife's living with a man would not alone terminate the husband's alimony obligation. The living together must have the appearance of marriage and that appearance must be outward. The court is wrong, therefore, in relying exclusively on the fact of "(Mrs Bell's) sharing a bedroom with (J.R.) on a regular basis for approximately three years." Ante at . That fact presents no outward appearance of anything. It was a private matter.

The significant point is that all the facts concerning the conduct and relationship of the wife and J.R. are equally consistent with a couple's not being married as they are with a couple's being

married.[1] Couples, married and unmarried, share living and travel expenses when they live together. In today's society, for better or for worse, unmarried couples live together and, from that fact alone, no conclusion can fairly be drawn that such couples are married or that they give the outward appearance of marriage. The fact of sharing a bedroom over a period of time is thus inconclusive on the question of an outward appearance of marriage.

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[1] There is one fact which, if true, might indicate that Mrs Bell and J.R. did not give the outward appearance of marriage. She testified that, during the entire time she had known J.R., she had dated other men and that she and J.R. had no arrangement by which she could not go out with other men. The opinion of the court ignores both this testimony concerning outward conduct and the trial judge's failure to consider it. The trial judge simply found that "on rare occasions (Mrs Bell) brought someone other than J.R. to . . . .cocktail parties" at J.R.'s apartment.

The disputed language would apply, however, if Mrs Bell were to have held herself out as married to J.R. That fact would have given the outward appearance of marriage. The facts in this case incontestably show that Mrs Bell made no such representation. It is not for us to apply our moral judgment to conclude that the sharing of a bedroom over a period of time should be treated as giving an outward appearance of marriage when, in fact, in today's world, such a sharing of a bedroom gives no such appearance.

ABRAMS, J., (dissenting). I cannot share the court's certitude that the plaintiff and her former husband agreed that his obligation to pay alimony would terminate if she shared a bedroom with another man "on a regular basis." Ante at . A separation agreement incorporated in a judgment of divorce is not an ordinary contract, but a judicially sanctioned contract setting forth the allocation between former spouses of rights, responsibilities, and resources. Although wives today may be less economically dependent on their husbands than was the case in the past, it remains true that the typical alimony recipient is a woman who has sacrificed her earning capacity to her marriage and who, as an equitable and practical matter, must look to her former husband for financial support following a separation or divorce. Such women have little bargaining power and to a large

extent must rely on judicial supervision to ensure that their entitlement to support is not made contingent on unjust and unreasonable conditions. See Knox v. Remick, 371 Mass. 433, 436-437 (1976). By giving its imprimatur to an interpretation of the Bells' separation agreement that hinges the plaintiff's entitlement to support on her conformity to life-style requirements imposed by the defendant, the court encourages economically-dominant husbands to meddle arbitrarily with the postdivorce lives of their wives, and thereby sends an unfortunate message to probate judges charged with scrutinizing such separation agreements to ensure that the agreements are "fair and reasonable." Knox v. Remick, supra, at 436.

To be sure, there is nothing unreasonable about provisions allowing the defendant and others similarly situated to discontinue support payments in circumstances

where the recipient's need is eliminated or met by another source. As construed by the court, the separation agreement and divorce judgment terminated the plaintiff's right to support solely because of her involvement in a relationship that does not have the defendant's approval, without any inquiry into its effect on her need for support and without reciprocal restraint on her husband.

Such a purely punitive elimination of support cannot be reconciled with the agreement's guarantee that "each (spouse) may lead his or her life free from any. . . . restraint by the other." But even if, as the court decides, the unjustified limitation on the plaintiff's personal life imposed by a cutoff of support in the circumstances of this case is not plainly inconsistent with the terms of the Bells' agreement, public policy considerations should operate to preclude the result

reached by the court. It is well established that a contractual restraint on fundamental private rights is subversive of public policy if it is "more onerous in its nature than is reasonably necessary for the proper fulfillment" of its purposes. Gleason v. Mann, 312 Mass. 420, 423-424, 425 (1942)(agreement that bound woman "to live a life of celibacy" unenforceable on public policy grounds where obligation "could be of no benefit" to employer). Compare Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 102-103 (1979). By interpreting and enforcing the clause at issue here so as to give judicial sanction to a termination of support, the court allies itself with alimony payors who exercise their economic power in a manner that unreasonably interferes with the private, autonomous lives of the spouse from whom they have been divorced. I dissent.

Nor. 82-379

APPEALS COURT
Norfolk, February 15, 1983--June 22, 1983

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

Present: Hale, C.J.,
Cutter, and
Kaplan, JJ.

CUTTER, J. Mrs. Bell appeals from the dismissal of her contempt complaint against her former husband for his failure to make support payments allegedly due to her under a judgment of divorce. The issue before us is the interpretation of a provision in the parties' separation agreement, reading that document as a whole and in the light of relevant Massachusetts law.[1]

[1]We refrain from stating any views concerning the conduct of any person involved in this matter. Any such views would be completely immaterial to the issue of interpretation.

The agreement and all the evidence before the probate judge are before us. We apply our own interpretation of the separation agreement to the subsidiary facts found by the judge (as distinguished from certain conclusions drawn by him, we think erroneously, from his subsidiary findings).

The parties were married in 1950. They have had two children, one born in 1956 and one born in 1958. Bell was in 1975 a vice-president of a substantial company. Mrs. Bell then was unemployed. Differences arose between Mrs. Bell and Bell. By 1976 they had been separated for some time.

On April 26, 1976, the parties entered into a separation agreement. By its terms Bell (subject to arbitration in the event of a substantial decline in his gross income) was to pay (as alimony

for tax purposes) significant monthly amounts for the support of Mrs. Bell.[2] These payments were to decrease in amount over fifteen years following the entry of final judgment of divorce and were to "terminate upon the happening of the following contingencies: (1) the (w)ife's death, (2) the (w)ife's re-marriage, and . . . (3) (the w)ife's living together with a member of the opposite sex, so as to give the outward

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[2]The Bells owned in 1976, as tenants by the entirety, a house in Cohasset worth $114,000, subject to a mortgage of about $36,000. They owned jointly certain savings accounts and securities. The agreement made an allotment of property to Mrs. Bell, including a transfer to her of (a) the Cohasset house (subject to the mortgage), (b) its tangible contents, (c) certain other specified tangibles, and (d) their joint accounts and their jointly held security accounts. The husband was to pay to her $100,000 on the entry of final judgment of divorce. It is not contended in this case that Bell failed to carry out the provisions of the separation agreement which were to take effect upon the completion of the original divorce proceeding.

appearance of marriage at any time prior to May 1, 1981, whichever of the . . . three . . . contingencies happens first." For convenience the preceding sub-paragraph (3), is hereafter sometimes referred to as "the disputed language."

A judgment nisi of divorce was entered as of November 28, 1975. This judgment incorporated the separation agreement, specifically stating that the "(a)greement shall survive this judgment and have independent significance." Bell has married again since the judgment became absolute.

On April 8, 1981, Mrs. Bell filed this comtempt complaint. Bell answered contending that his obligation to support Mrs. Bell had terminated because she was "living together with a member of the opposite sex so as to give the outward appearance of marriage."

Following a trial the probate judge dismissed Mrs. Bell's contempt complaint.[3] She has appealed. The judge made subsidiary findings of fact essentially as follows:

(a) Mrs. Bell resided at the Cohasset house (see note 2 supra) until March, 1978. That spring she spent some time at the Cohasset house and some time at the one-bedroom Boston apartment of a man referred to in the record as J.R.'s apartment except for a total of three weeks spent "with her daughter on an irregular basis." From October, 1979, through June, 1980, she stayed in the Cohasset house on a sporadic basis but "for the most part" stayed at J.R.'s

[3]He also dismissed with prejudice a counterclaim filed by Bell seeking to recover amounts of alimony theretofore paid by him, and entered an order that Bell and Mrs. Bell were to pay their own costs and counsel fees. No appeal was claimed by Bell from the dismissal of his counterclaim.

apartment. She sold the Cohasset house on April 1, 1980, and had removed her belongings by June, 1980.

(b) The apartment lease stands solely in J.R.'s name. Mrs. Bell's name does not appear in the lease or on the mailbox or the door. The monthly rent ($450.00) and utilities (except for Mrs. Bell's long distance calls, which she has paid) are paid by J.R.. From June, 1978, through May, 1981, she "cohabited with J.R." at the apartment. She "purchased all of the food and did most of the cooking and cleaning." Part of the furniture at the apartment is hers. Part belongs solely to J.R..

(c) Mrs. Bell and J.R. "have always maintained separate bank accounts, checking accounts, and investments." They have never commingled assets or held joint bank accounts.

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(d) Until June, 1980, Mrs. Bell remained a member of a club in Cohasset. During this time she took J.R. there as her guest about once a month for tennis and social functions. He reciprocated by taking her as his guest to clubs to which he belongs. After June, 1980, she reimbursed him for half the bills incurred by him for taking her to his clubs as his guest.

(e) Mrs. Bell has never maintained a mail address at J.R.'s apartment. She received mail at Cohasset until she sold the house in 1980. Thereafter she received mail in care of her employer until her employment (apparently obtained after the divorce) was terminated on January 31, 1981. Since then she has received mail at a post office box.

(f) She and J.R., in addition to playing golf and tennis and dining together, have played bridge together

about twice a week, occasionally at clubs "prescribed by" a national contract bridge league. They have taken trips together. She has paid one-half of the costs of each trip. They have given cocktail parties together and attended such parties together. At no time has Mrs. Bell represented to any third party that she was married to J.R. nor has she ever used his surname.[4]

The probate judge concluded that, as of February 1, 1981, Mrs. Bell "had established a permanent relationship with J.R." and "was habitually residing with . . . (him) in a life style which would lead a reasonable person to believe

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[4]The probate judge found, after hearing Mrs. Bell's testimony (and we, after reading that testimony agree) that Mrs. Bell "did not, at any time, conceal her cohabitation with J.R. either from the court or from Bell." Certainly her testimony, as we read it, was marked by candor and showed no attempt to conceal or distort any conduct even if it might turn out to be adverse to her present contentions.

that they were living in a marital relationship" and that their "conduct . . . gave the outward appearance of marriage." The judge also concluded that Mrs. Bell as of February 1, 1981, "was receiving a measure of support from J.R. by virtue of his paying the rent and utilities and that continued alimony paid by" Bell "would, to a certain extent, provide" Mrs. Bell "with overlapping support."

The probate judge, in addition to drawing conclusions from his subsidiary findings as just indicated, made rulings of law (1) that the "relationship (of Mrs. Bell and J.R.) is sufficient to create an outward appearance of marriage"; (2) that the language about "outward appearance of marriage" relates to Mrs. Bell's conduct and the "objective nature of the relationship and does not depend on whether . . . third persons are led to believe in the existence of a

ceremonial marriage"; (3) that the disputed language of the agreement does not require Bell to prove that Mrs. Bell represented to third persons that she and J.R. were married; and (4) that Mrs. Bell has forfeited her right to alimony under the agreement after February 1, 1981, because to rule otherwise would permit an ex-wife to receive support from another man and still compel her ex-husband to pay alimony by simply refraining from any formal marriage ceremony.[5]

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[5]The judge also ruled, perhaps in too expansive terms, that it was permissible to receive extrinsic testimony concerning the disputed language of the separation agreement, which he regarded as ambiguous, "as an aid to construing the contract and the intent of the parties." He received testimony from the attorney who represented Bell in negotiating the separation agreement. Mrs. Bell's former attorney's somewhat inconclusive testimony so far as it relates to that attorney's purpose in requesting the insertion of the disputed language. See Liacos, Handbook of Mass. Evidence, 385-392 (5th ed. 1981). We regard his testimony

1. Massachusetts does not recognize common law marriage. See Davis v. Misiano, 373 Mass. 261, 262-263 (1977), holding that, despite "(c)ohabitation (with a man) within the Commonwealth, a woman has no right to receive support" from him, absent a formal solemnization of marriage. See also Heistand v. Heistand, Mass. Adv. Sh. (1981) 1561, 1565-1567. Compare Glazer v. Silverman, 354 Mass. 177, 197-181 (1968), and Ruquist v. Ruquist, 367 Mass. 662, 664-667 1975), in each of which, on balance, special equitable considerations (not present here) were deemed sufficient to justify sustaining the trial court's termination of support provisions.

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5 as helpful only as it discloses some background of the negotiations, by showing that the insertion of the disputed language was requested by Bell's former attorney, and that the suggestion in some respects was objected to by Mrs. Bell's then counsel.

Certainly, unless perhaps by some contractual arrangement, Mrs. Bell could not obtain in Massachusetts the right to support from J.R. without assuming the obligations to him involved in a ceremonial marriage. The evidence shows that she was expecting no support from J.R. and asserting no claim to it. Instead she was attempting to pay her reasonable share of their joint expenses.

2. No Massachusetts case dealing with a provision precisely like the disputed language has been called to our attention. See as to somewhat related problems, Surabian v. Surabian, 362 Mass. 342, 346 (1972), and cases cited. See also Gerrig v. Sneirson, 344 Mass. 518, 520-521 (1962); Lombard, Family Law, §§ 1265, 1351, 2245 (1967 and Supp. 1981). An annotation in 98 A.L.R. 3d 453 (1980) deals (see note 6 at 457) primarily with the effect upon alimony of an ex-wife's

conduct after the divorce judgment where there is either no separation agreement or the agreement is merged in the judgment.

When the Bell's separation agreement is read as a whole, one probable meaning of the disputed language becomes apparent. As the Surabian case indicates, the death or remarriage of Mrs. Bell, by the express terms of the separation agreement, would have terminated her right to alimony. Actual remarriage presumably would have given her a "right to be supported by another man." See Southworth v. Treadwell, 168 Mass. 511, 512-513 (1897). The disputed language appears in the same sentence of the separation agreement as the provisions concerning death and remarriage (both circumstances in which Mrs. Bell would have no further need for support). This we regard as strong indication that, where there is a

continuing need for a right to support, that need should be a primary consideration in interpreting and applying the disputed language.

This disputed language also must be read in connection with other provisions of the separation agreement. It was expressly recited that, although Mrs. Bell (in 1975) had an unstated amount of "assets standing in her own name," she was "primarily dependent on the (h)usband for her care, support and maintenance." There also was an explicit general provision that "neither the (h)usband nor the (w)ife will hereafter interfere with the personal liberty of the other, and each may lead his or her life free from any criticism or restraint by the other." The purpose of the entire agreement was stated in part as "to settle the (h)usband's obligation

arising out of the marital relationship to support and maintain the (w)ife" as set forth in the agreement.

The predominant interest of the wife plainly was in making certain that she would have the support reasonable for her to expect from a business executive of some standing to whom by 1975 she had been married for a quarter of a century and whose children she had raised. Nothing about her expense-sharing arrangement with J.R. indicates any consequent diminution in her need for support.

The provision that neither Bell nor Mrs. Bell would interfere with the other's liberty to lead his or her life free of restraint is plainly inconsistent with any effort by Bell to control her life-style. That life-style was for her to determine, free from his coercion. It may well be that her avoidance of further

legally binding marital commitments in some degree was and is based on her earlier experience with marriage. In any event, the provision (for noninterference) leads us to interpret the disputed language as calling for a cessation of alimony only upon remarriage or in circumstances so closely like marriage as to result in Mrs. Bell acquiring significant actual support or a new right to support from a man prior to the specified date in 1981. Obviously Bell (who has remarried) was under no economic coercion, based on the separation agreement, not to remarry or even to refrain from less binding arrangements. On the other hand, the threat or fear of loss of alimony could well be coercive of the arrangements made by Mrs. Bell.[6]

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[6]Questions of policy, perhaps strengthened by the Equal Rights Amendment (art. 1 of the Declaration of Rights of the Massachusetts Constitution as amended by art. 106 of the Amendments (1976) may

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3. In our opinion, the probate judge was clearly in error (both on the evidence and on his own subsidiary findings) in certain of his conclusions and rulings.

(a) We regard as without basis in his subsidiary findings or in the evidence the judge's conclusions that Mrs. Bell was receiving "a measure of support" from J.R.. The judge had found that, although J.R. alone paid the apartment rent of $450 per month and some utility expenses, Mrs. Bell purchased all the food and did most of the cooking and cleaning. With food costs current since the date of the agreement, it appears from the evidence that Mrs. Bell

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[6]set limits on the use by a spouse of undue financial or other pressure to impose a given life pattern upon the other spouse after termination of the marital relationship. Such questions do not arise on the interpretation of the disputed language here adopted.

was contributing approximately as much as J.R. toward their joint living costs. If it be relevant, precise or even substantial equality of sharing expenses could not be expected reasonably in such an informal situation even from a woman apparently determined (as the evidence strongly suggests) to pay her own way in a relationship which involved no permanent commitment or ceremonial marriage.

(b) As already stated, we interpret the disputed language as requiring no forfeiture of alimony so long as Mrs. Bell does not obtain the right to support from another man by a ceremonial marriage or by some binding arrangement, at least where the evidence shows that she was not substantially supported by him. We think it immaterial whether persons who did not know her may have thought that she was married to J.R..

It was not a matter with which strangers reasonably should have concern.[7] This is unobtrusive and inconspicuous expense-sharing arrangement in the substantial anonymity of urban apartment life cannot be appraised reasonably by what strangers would or may have thought about it.[8]

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[7]The probate judge's conclusion that the disputed language relates to the "objective nature of the relationship and does not depend on whether . . . third persons are led to believe in the existence of a ceremonial marriage" may be internally inconsistent. It, however, tends to recognize that it is irrelevant what strangers to Mrs. Bell and J.R. may think on the subject.

[8]The probate judge interpreted the disputed language "as intended to prevent the elimination of alimony in the event that . . . (Mrs. Bell) subsequent to her divorce, lived with a relative or took in a boarder" or "in the event . . . (she) lived with another man for a short or insubstantial period of time, as opposed to a protracted period of time." We reject this interpretation. It implies the unlikely intention that, although there would be no cessation of alimony if she engaged in brief, casual, or promiscuous affairs, alimony must cease if she participates in a more stable, more sedate, and longer expense-sharing arrangement.

As stated above, there was no evidence whatsoever that Mrs. Bell ever held herself out as J.R.'s wife to any person (whether or not they knew her). See Northrup v. Northrup, 43 N.Y. 2d 566, 570-573 (1978). Compare O'Connor Bros. Abalone Co. v. Brando, 40 Cal. App. 3d 90, 95 (1974). Contrast Lang v. Superior Court, 53 Cal. App. 3d 852, 856-861 (1975), which viewed the statute there discussed as involving "holding out" to the general public and not merely to persons who knew the couple. The Northrup case is based largely upon the provisions of a pertinent New York statute, N.Y. Dom. Rel. Law § 248 (see now McKinney 1977). Whether, however, there is "holding out" by a woman that she is married, to persons having an interest in inquiring about her status (or at least in fact inquiring), may be,

in our opinion, a significant consideration in determining whether there exists the outward appearance of marriage.[9] In the light of the consideration mentioned and of our interpretation of the disputed language, we perceive on this record no basis for the termination of Mrs. Bell's alimony.

4. The judgement is reversed and the case is remanded to the Probate Court for further proceedings consistent with this opinion. We think (essentially as did the probabe judge) that this is a case in which costs in the trial court and on appeal should be shared evenly and in which each party should bear the reasonable counsel fees

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[9]See other New York decisions, e.g., Stern v. Stern, (N.Y.) 88 Misc. 2d 860, 864 (N.Y. Sup. Ct. 1976); Citron v. Citron, 91 Misc. 2d 785, 788 (N.Y. Sup. Ct. 1977). See also Levine v. Levine, 79 Misc. 2d 149, 151 (N.Y. Sup. Ct. 1973). Compare Lang v. Superior Court, 53 Cal. App. 3d at 861.

incurred by him or her.

So ordered.

HALE, C. J. (dissenting). In my view the majority ignores the plain language of the agreement. The plaintiff by living with J.R. in what the judge found to be "a permanent and enduring relationship" and by socializing, eating meals, taking trips, and attending functions with J.R. was "living together with a member of the opposite sex, so as to give the outward appearance of marriage." The majority places heavy emphasis on the amount of support received by Mrs. Bell and concludes that the disputed clause would not operate to terminate her right to alimony unless she became entitled to receive support from a man (part 1 of the majority opinion leaves unclear just how that can be accomplished without a marriage) or acquired "significant actual support" from a man. While arrangements

for support might in some cases be a factor to consider in determining whether there was an "outward appearance of marriage," in the typical case, the arrangement for support or the payment of expenses would be a private matter having little bearing on outward appearances. There is no evidence in the record before us that they were treated otherwise by Mrs. Bell and J.R..

In the instant case, all of the critical factors of a marital relationship were present. While Mrs. Bell may have carefully avoided representing that she was married to J.R., she enjoyed what was essentially a marital type relationship with him. She cannot now avoid the financial consequences of those actions by relying on factors such as the maintenance of a separate mailing address or the failure to sign

the lease, which did not affect the basic character of their relationship. The avoidance of a change of name by Mrs. Bell, the couple's non-use of "Mr. and Mrs.," and their use of separate bank accounts are practices followed by many married couples. If such formalities are to be given the effect of precluding, as matter of law, a finding that Mrs. Bell's living arrangement gave the outward appearance of marriage, the clause in question -- not uncommon in separation agreements -- will as a practical matter be nullified.

THE COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

NORFOLK DIVISION PROBATE AND FAMILY COURT
NO: 74D1615

Anne C. Bell, Plaintiff)
)
vs. )
)
Lowry M. Bell, Jr., Defendant)
January 12, 1982

PROCEDURAL BACKGROUND
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

I. PROCEDURAL BACKGROUND

The plaintiff and defendant were divorced by a judgment nisi dated April 28, 1976, which was made nunc pro tunc November 28, 1975. The Judgment incorporated a separation agreement dated April 26, 1976, which did not merge into the Judgment, but rather survived as an independent contract.

On April 8, 1981 the plaintiff filed a complaint for contempt alleging that

the defendant had failed to make support payments required by the separation agreement which were due February 1, March 1, and April 1, 1981. The total amount alleged to be due the plaintiff as of the time of the hearing of the contempt was $6,439.98.

On May 8, 1981 the defendant filed an Answer to the plaintiff's complaint for contempt denying that he had not obeyed the judgment nisi, and denying that he was in civil contempt. The defendant further asserted a counter-claim alleging that his obligation to support the plaintiff terminated on account of the plaintiff's "living together with a member of the opposite sex so as to give the outward appearance of marriage," which language was contained in the separation agreement. The defendant further asserted in his counterclaim that the plaintiff had

wrongfully and fraudulently collected alimony payments for a period of four years, and sought a judgment against her in the amount of $74,033.52, which allegedly was paid to her during the period of her cohabitation with a member of the opposite sex.

On May 15, 1981 the plaintiff filed her Answer to the defendant's counter-claim denying the pertinent allegations, and asserted the affirmative defenses of lack of subject matter jurisdiction and estoppel.

II. FINDINGS OF FACT

1. The plaintiff and defendant were divorced by a judgment nisi entered on April 28, 1976, and made nunc pro tunc to November 28, 1975.

2. The judgment nisi incorporated a separation agreement dated April 26, 1976, which agreement survived the judgment as an independent contract.

3. The separation agreement required the defendant to pay to the plaintiff alimony for a period of fifteen years in 180 monthly installments which were in gradually diminishing amounts.

4. The defendant paid the amounts required by the agreement for the first 57 months following the entry of the final judgment of the divorce. Thereafter he refused to pay the support payments for the four months, due February 1, March 1, April 1 and May 1, 1981 totaling $6,439.98, which represents three monthly payments each in the sum of $1,682.91, and one monthly payment in the sum of $1,391.25.

5. The basis of the defendant's refusal to pay support for the aforesaid four months was set forth in a letter dated January 19, 1981 sent by him to the plaintiff alleging that she was

"openly and continuously cohabiting with a certain gentleman" for approximately four years, which conduct on the plaintiff's part, according to the defendant, justified a termination of alimony payments pursuant to the terms of the separation agreement.

6. Article 2 paragraph (b) of the separation agreement provides that all payments by the defendant to the plaintiff for the latter's care, support and maintenance shall terminate upon the happening of any one of the following contingencies: "(1) the wife's death, (2) the wife's remarriage, and/or (3) said wife's living together with a member of the opposite sex, so as to give an outward appearance of marriage at any time prior to May 1, 1981, whichever of the said three contingencies happens first.

7. At the commencement of the hearing the parties stipulated that the arrearage, if actually determined to be owed, should be in the amount of $6,439.98 as of May 1, 1981. The parties further stipulated that the defendant had the ability to pay the arrearages, if it were determined the said arrearages were actually owed pursuant to the terms of said agreement.

8. Pursuant to the terms of the separation agreement, the plaintiff received title to the marital home located at 135 Nichols Road, Cohasset (hereinafter referred to as Cohasset House).

Following the entry of the judgment nisi, the plaintiff resided at the Cohasset House on a regular basis until March of 1978. From March 1978 until the summer of 1978 the plaintiff resided some of the time at

the Cohasset House and some of the time at 21 Beacon Street, Boston, in an apartment leased by an individual identified by agreement of the parties as "J.R.".

9. The plaintiff rented the Cohasset House to Donald O'Neil from the summer of 1978 to November 1978. Thereafter the plaintiff permitted the Cohasset House to be sublet to Leland Wilson from November, 1978 to May, 1979. Thereafter the plaintiff rented the Cohasset House to Ronnie Wiseburg from June, 1979 to October 1979.

10. The plaintiff sold the Cohasset House on April 1, 1980, but was permitted by the buyer to remain there until June 1980. Between the period of April 1, 1980 and June 1980, the plaintiff packed her belongings and removed them from the Cohasset House.

11. From the time of the entry of the judgment nisi on April 28, 1976 until March 1978 I find that the plaintiff resided at the Cohasset House on a regular basis. From March 1978 through June 1978 the plaintiff resided at the Cohasset House on an irregular basis, during which time she also resided with J.R. at his apartment at 21 Beacon Street on an irregular basis.

12. The plaintiff did not reside at the Cohasset House from June 1978 through October 1979, during which period she resided on a regular basis with J.R. at his apartment at 21 Beacon Street, Boston.

During this period of time the plaintiff also resided with her daughter on an irregular basis for a total accumulative time of three weeks.

13. The plaintiff resided in the Cohasset House from October 1979 through

June 1980 on a sporadic basis and for the most part during that period of time resided with J.R. at his apartment at 21 Beacon Street, Boston.

14. The lease at 21 Beacon Street, Boston stands solely in J.R.'s name. The plaintiff's name does not appear in the lease, or the mailbox of on the door. The monthly rental in the approximate amount of $450.00 per month is paid solely by J.R.

15. During the period of time from June 1978 through May 1981, the plaintiff on a regular basis cohabited with J.R. at the 21 Beacon Street apartment, during which time they shared the same bedroom. The plaintiff purchased all of the food, and did most of the cooking and cleaning. J.R. did some of the cooking and cleaning during this time.

16. In addition to the monthly

rental of $450.00, J.R. paid all the utilities of the apartment, with the exception of long distance telephone calls made by the plaintiff for which she paid.

17. Part of the furniture and furnishings located at 21 Beacon Street, Boston, belong solely to the plaintiff, and part belong solely to J.R. The plaintiff and J.R. have always maintained separate bank accounts, checking accounts and investments. At no time have J.R. and the plaintiff commingled their assets nor have they ever created any joint accounts.

18. After the entry of judgment nisi and until the summer of 1980, the plaintiff maintained a membership at the Cohasset Country Club, and on a regular basis invited J.R. as a guest to dinner and for tennis and for other social functions. The plaintiff terminated her

membership at the Cohasset Country Club in June 1980. During this period of time J.R. did not reimburse her for his guest expenses at the Cohasset Country Club.

19. The rules of the Cohasset Country Club permitted the plaintiff to have a guest once a month and that guest usually was J.R.

20. During this same period of time, J.R. maintained his membership at the Dedham Country Club and the Country Club at Brookline and frequently entertained the plaintiff at both clubs at his sole expense. After the plaintiff terminated her membership at the Cohasset Country Club in June 1980, she then reimbursed J.R. for one half of his bills at his Country Clubs which were incurred by her as a guest.

21. The plaintiff never maintained a mailing address at 21 Beacon Street,

Boston, and received her mail at the Cohasset House until it was sold in April 1980. Thereafter the plaintiff received her mail at the place of her employment, the Flatley Company, located at 18 Tremont Street, Boston, until January 31, 1981 when she terminated her employment. Following the termination of her employment, the plaintiff received her mail at a post office box in Government Center, Boston.

22. In addition to the Country Club activities of golf, tennis, and dining shared by the plaintiff and J.R., they also played bridge approximately twice a week and on occasion twice a month at the Cavendish and Puritan Clubs and at other locations prescribed by the American Bridge Contract League.

23. The plaintiff also took several vacation trips with J.R. which are described as follows:

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(a) In the summer of 1978 the plaintiff and J.R. travelled to Ireland together. The plaintiff repaid J.R. the sum of $800.00 which represented one half of the costs of the trip.

(b) In February, 1978 the plaintiff and J.R. stayed at the Sunlight Inn in Bermuda for two weeks. The plaintiff paid for one half of the costs of the trip.

(c) In 1980 the plaintiff and J.R. took an automobile trip to Washington D.C. where they stayed approximately four days.

24. During the trips to Ireland and Bermuda, J.R. registered at the hotels upon arrival. The plaintiff did not register at either hotel in her own name.

25. From the period of time commencing in the summer of 1978 through May 1981 the plaintiff and J.R. had

cocktail parties at 21 Beacon Street, Boston. Prior to these cocktail parties the plaintiff and J.R. discussed who they wished invited as their guests. In addition, the plaintiff and J.R. attended several parties together and on rare occasions the plaintiff brought someone other than J.R. to these cocktail parties.

26. At no time did the plaintiff represent to a third party that she was married to J.R., nor did she at any time utilize J.R.'s surname.

27. Attorney Burton Schair represented the defendant throughout 1975 and 1976, during which time the terms of the property settlement agreement were negotiated with Attorney Brooks Potter, who represented the plaintiff.

It was the intent of Attorney Schair and his client, the defendant, to insert language in the agreement which

have the effect of terminating alimony in the event the plaintiff were to live with another man who was not related to her for a prolonged period of time as opposed to a temporary liaison. The language "said wife's living together with a member of the opposite sex, so as to give the outward appearance of marriage" was intended to prevent the elimination of alimony in the event that the plaintiff, subsequent to her divorce, lived with a relative or took in a boarder. The language also was intended to prevent the termination of alimony in the event the plaintiff lived with another man for a short or insubstantial period of time, as opposed to a protracted period of time.

28. I find that the plaintiff did not at any time conceal her cohabitation with J.R. either from the Court or from the defendant.

29. I find that as of February 1, 1981 the plaintiff had established a permanent relationship with J.R. and that as of February 1, 1981 she was habitually residing with J.R. in a life-style which would lead a reasonable person to believe that they were living in marital relationship.

30. I find that the plaintiff and J.R. spent weekends together, resided together, socialized together as a couple, planned parties together, and took trips together,and that the conduct of the plaintiff and J.R. gave the outward appearance of marriage as of February 1, 1981.

31. I find that the living arrangements and life-style shared by the plaintiff and J.R. demonstrated that their relationship was not a temporary liaison, and that as of February 1, 1981 a permanent enduring

relationship had developed, which relationship gave the outward appearance of marriage.

32. I find that the plaintiff as of February 1, 1981 was receiving a measure of support from J.R. by virtue of his paying the rent and utilities, and that continued alimony paid by the defendant after February 1, 1981 would, to a certain extent, provide the plaintiff with overlapping support.

III. CONCLUSIONS OF LAW RE: PLAINTIFF'S COMPLAINT FOR CONTEMPT

1. The plaintiff's relationship with J.R., consisting of sharing a residence, socializing as a couple, eating their meals together, taking trips as a couple, and attending functions together would lead a reasonable person to believe that they were living in a marital relationship. Such relationship is sufficient to create

an outward appearance of marriage as of February 1, 1981.

2. If language exists in a separation agreement which is ambiguous and does not have a clear and precise definition, extrinsic evidence may be offered and received by the judge as an aid to construing the contract and the intent of the parties.

3. A contract must be interpreted as to give effect to the intention of the parties as it appeared at the time of the contract, insofar as the intent is ascertainable and lawful.

4. The language "living together with a member of the opposite sex, so as to give outward appearance of marriage" relates to the conduct of the plaintiff, and the objective nature of the relationship, and does not depend on whether or not third persons are led to believe in the existence of a

ceremonial marriage.

5. The termination of alimony pursuant to the language contained in Article 2(B) of the separation agreement does not require the defendant to prove that his former wife made affirmative representations to third parties that she and her paramour were married.

6. By her actions, the plaintiff has forfeited her right to receive alimony from the defendant pursuant to the terms of Article 2(B) of the separation agreement after February 1, 1981. To hold otherwise would create a situation where an ex-wife could receive support from her paramour, and in addition compel her ex-husband to pay support by the simple expediency of never formally participating in a marriage ceremony.

7. To eliminate alimony for a woman

who remarries and to allow overlapping support for a woman who enters into a continuous and open unmarried relationship would unfairly make a distinction based upon a title, rather than upon the reality of the situation.

IV. CONCLUSIONS OF LAW RE: DEFENDANT'S COUNTERCLAIM

1. The defendant by virtue of his counterclaim seeks equitable relief relative to the return of alimony previously paid by him. This claim is cognizable under the general principles of equity jurisdiction granted through the Probate Court pursuant to G.L. Ch. 215, § 6, which, inter alia, confers concurrent jurisdiction upon the Probate Court to grant equitable relief in controversies over property between persons who have been divorced.

2. The fact that the defendant included in his counterclaim a prayer

that the defendant be ordered to compensate him directly does not remove the case from the jurisdiction of the Probate Court. Relief is based on the allegations of the counterclaim, and not on its prayers.

3. The plaintiff's conduct and her collection of alimony from the entry of the judgment of divorce absolute through January 31, 1981, did not constitute a wrongful and fraudulent act, as alleged in the defendant's counterclaim.

_____ _____

DATE JUSTICE

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court for the Commonwealth

At Boston, September 13, 1984

In The Case No. SJC-3323

ANNE C. BELL

VS.

LOWRY M. BELL, JR.

pending in the Probate and Family Court Department of the Trial Court for the County of Norfolk, No. 74D1615

ORDERED, that the following entry be made in the docket; viz.,-

Judgment of the Probate Court affirmed.

By the Court,

/s/ Frederick J. Quinlan,
Asst. Clerk

Sept. 13, 1984

See opinion on file.

(3)

Office - Supreme Court, U.S.
FILED
FEB 12 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-955

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

Anne C. Bell
Petitioner,

v.

Lowry M. Bell, Jr.
Respondent.

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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## QUESTION PRESENTED

Did the trial court properly interpret the provision in the parties' separation agreement which terminated the ex-wife's entitlement to alimony when she began "living together with a member of the opposite sex, so as to give the outward appearance of marriage?"

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## ARGUMENT

This case involves nothing more than the interpretation of a provision in the separation agreement reached by the parties prior to their divorce in 1976. Under this agreement, which was entered into freely by both parties under advice of counsel, the petitioner Anne C. Bell (referred to in this brief as "the wife") was entitled to monthly alimony payments for fifteen years subject to the following contingencies: (1) the wife's death; (2) the wife's remarriage; or (3) the wife's "living together with a member of the opposite sex, so as to give the outward appearance of marriage." In 1981, the respondent Lowry M. Bell, Jr. ("the husband") notified the wife that he was terminating alimony payments because of the wife's continuing cohabitation with a man. The wife litigated her entitlement to alimony and lost, the trial court agreeing with the husband

that the wife's continuous relationship with a man gave the outward appearance of marriage, thus satisfying the third contingency of the contract. The trial court's interpretation and decision was upheld by the Supreme Judicial Court of Massachusetts.

Not satisfied with these state court decisions, the wife is now seeking another review of the trial court's decision, and in an attempt to invoke this Court's jurisdiction she has tried to put a constitutional gloss on her former argument of contractual construction or interpretation. For several reasons, this Court should decline to hear this case. First, the state courts at no time considered or addressed any federal question or constitutional issues. Second, because the case simply involves a wife's entitlement to alimony under a separation

agreement, it is a domestic relations case, an area of law in which federal courts have traditionally declined to become involved. Finally, even assuming for the moment that the wife had raised her constitutional claims appropriately in the lower courts, her constitutional arguments are wholly insubstantial and are without merit.

## I. THE PETITIONER FAILED TO RAISE ANY CONSTITUTIONAL ARGUMENTS IN THE LOWER STATE COURT PROCEEDINGS, AND THE COURTS BELOW DID NOT ADDRESS ANY CONSTITUTIONAL ISSUES.

This case was argued and decided at three separate levels in the Massachusetts courts solely on the basis of state law. At no time in the courts below was any issue other than contractual interpretation before the courts for decision. Although the wife contends in her petition that "[t]he federal

questions which petitioner asks this Court to review were briefed and argued before the Massachusetts Supreme Judicial Court," (Petitioner's Brief at 17, n.5), this is clearly a distortion of the facts. The only point in the entire proceedings at which the constitutional arguments were even mentioned was in the petitioner's supplemental brief to the Supreme Judicial Court. Further, in its opinion the Supreme Judicial Court specifically stated that it was declining to consider such issues because they were not raised at the trial court or the Appeals Court. (Appendix at A-10)

Thus, this case falls squarely within this Court's well-established rules that it will not consider issues not ruled upon below, Duignan v. United States, 274 U.S. 195 (1927), and that the Court will not review a

state court judgment in which no federal question was considered. Cardinale v. Louisiana, 394 U.S. 431 (1969); Honeyman v. Hanan, 300 U.S. 14 (1937); Lynch v. New York, 293 U.S. 52 (1934). It is essential to this Court's jurisdiction in reviewing a state court decision that the record affirmatively show not only that a federai question was presented for decision to the highest court of the state, but that it was actually decided. Honeyman v. Hanan, supra; see 28 U.S.C. § 1257.

In this case, the wife acknowledges these general rules, but attempts to argue around them by claiming that she raised her constitutional claims "at the earliest opportunity" after an "unforeseeable and indefensible" ruling by the Supreme Judicial Court. (Petitioner's Brief at 7-8)

The wife's reliance on this theory is misplaced. At a minimum, the fact that the trial court ruled against her would indicate that the Supreme Judicial Court's ruling reaching the same conclusion was not "unforeseeable" and could have been anticipated. Despite the unfavorable trial court decision, the wife did not raise her constitutional claims in the Appeals Court, instead waiting until submitting her supplemental brief to the Supreme Judicial Court.

Further, the wife cannot rely on the narrow exception to the general rule reflected in PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), and the cases noted in footnote 9 of that decision. The exception described and applied in PruneYard arises where a state supreme court unexpectedly overrules its own prior decision in a case

presenting the exact same issue as the prior case. In this case, the wife's lengthy discussion of Massachusetts law (Petitioner's Brief at 8-17) serves to underscore the fact that there have been no Massachusetts decisions which involve the particular contractual provision at issue in this case--or any similar provisions--so the wife cannot claim any reliance on a prior holding which was unexpectedly reversed.

The Massachusetts courts have consistently held that a party cannot raise issues on appeal which were not raised below. Phillips v. Youth Development Program, Inc., 390 Mass. 652, 459 N.E.2d 453 (1983) (constitutional issue not raised); Caswell v. Licensing Commission for Brockton, 387 Mass. 864, 444 N.E.2d 922 (1983) (same); Penney v. First National Bank, 385 Mass. 715, 433

N.E.2d 901 (1982). Thus, the wife was well aware of the need to raise all issues at an earlier stage than the second round of appeals. This well-established rule, together with the complete absence of any prior controlling Massachusetts case law on her claims, operates to prevent the wife from arguing that she should be excused from raising her constitutional claims at the appropriate stage of the proceedings.

No purpose would be served by having this Court decide the wife's constitutional claims in light of the fact that the lower courts have not addressed them. The wife cannot now invoke this Court's jurisdiction since not only has the Supreme Judicial Court of Massachusetts failed to decide a federal question of substance, it has not decided a federal question at all. Thus, under the

guidelines of Rule 17 of this Court, and pursuant to clearly established precedent, see Duignan v. United States, supra; Cardinale v. Louisiana, supra, this is a totally inappropriate case for this Court's review.

## II. THE ISSUE PRESENTED IS SIMPLY THE INTERPRETATION OF A SEPARATION AGREEMENT, WHICH FALLS WITHIN THE TRADITIONAL DOMESTIC RELATION EXCEPTION TO FEDERAL COURT JURISDICTION.

As discussed above, this case presents the simple issue of the interpretation of a separation agreement between a husband and wife which they entered into prior to their divorce. Although the wife has couched her claim before this Court in the guise of a federal question, the true underlying issue is whether the wife is entitled to alimony under the terms of the agreement. As such, the case clearly falls within the category of

domestic relations cases which the lower federal courts and the Supreme Court have traditionally--and rightfully--left to the states for adjudication.

This Court has long recognized that domestic relations cases are inappropriate cases for Supreme Court review. As this Court stated in Ohio ex rel. Popovici v. Agler: "[T]he jurisdiction of the Courts of the United States over divorces and alimony always has been denied." 280 U.S. 379, 383 (1930); see also In re Burrus, 136 U.S. 586 (1890); Barber v. Barber, 62 U.S. (21 How.) 582 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony. . . .").

The underlying reasons for the reluctance of federal courts to become involved in

domestic relations disputes are particularly apt in the present case. The dispute centers around the application of Massachusetts law regarding separation agreements and their interpretation. No substantial federal issue has been raised, even though the wife has attempted to fashion a constitutional claim (see Argument III, infra). The trial court, acting within its discretion, found that the wife's conduct satisfied the contingency clause of the parties' separation agreement. In doing so, the court concluded that the wife's relationship with her cohabitant gave the outward appearance of marriage under Massachusetts law.

Such purely state law domestic issues clearly are within the proficiency and expertise of state courts, and would not afford a basis for federal jurisdiction under the

principles set forth in Barber v. Barber, supra, and Ohio ex rel. Popovici v. Agler, supra. Thus, it would be completely inappropriate for this Court to undertake a review of the domestic issues at this point.

## III. THE ALLEGED CONSTITUTIONAL ISSUES ARE INSUBSTANTIAL AND ARE NOT WORTHY OF ATTENTION FROM THIS COURT

The wife has contended in her petition that her rights to equal protection and to privacy were violated by the enforcement of the separation agreement which she contracted with her husband. These claims are wholly without merit and are not worthy of consideration by this Court.

It is clearly established that this Court will not review cases which present insubstantial or frivolous federal claims. Wick v. Chelan Electric Co., 280 U.S. 108

(1929); Zucht v. King, 260 U.S. 174 (1922). Moreover, Supreme Court Rule 17 indicates that a review on writ of certiorari will be granted only when there are "special and important" reasons, such as when a state court has decided an "important" question of federal law. As discussed above in Argument I, in this case the Massachusetts court did not even address--much less decide--any important questions of federal law, and therefore the wife's constitutional claims are not properly before the Court. Even if they were, however, it is clear that they do not hold up under close scrutiny and analysis.

First, the wife has completely misstated the findings of the trial court in her statement of the Questions Presented. (Petitioner's Brief at i) Contrary to the wife's assertion

that her support payments were terminated "solely upon the ground of petitioner's intimate association with an unrelated man on a regular basis," in fact her support was terminated pursuant to a provision in a separation agreement to which she had freely contracted. This provision explicitly allowed the husband to terminate the wife's alimony payments if she was "living together with a member of the opposite sex, so as to give the outward appearance of marriage." After examining the evidence, the trial court and the Supreme Judicial Court of Massachusetts agreed that the wife's relationship with her cohabitant gave the outward appearance of marriage. Although the wife consistently misstates the basis for the trial court's decision, the simple fact is that it did not rest either "solely" or in

any way on the examination of intimate details of the wife's relationship. Rather, the court's decision rested on factors demonstrating the "outward" appearance of marriage which is listed in its conclusions of fact and conclusions of law. In the trial court's own words:

> The plaintiff's relationship with J.R., consisting of sharing a residence, socializing as a couple, eating their meals together, taking trips as a couple, and attending functions together would lead a reasonable person to believe that they were living in a marital relationship.

(Appendix at A-60) These factors are set forth in more detail over several pages in the trial court decision. (Appendix at A-52-60) Nowhere in the trial court's opinion is there any discussion of any intimate details of the wife's relationship, nor is there any reference to any such intimate

details in the opinion of the Supreme Judicial Court. In short, both decisions rested on many different examples of outward and public evidence of a marital relationship. Thus, the wife displays a reckless disregard for the truth when she states on page 25 of her brief, after referring to two questions at trial establishing that she and her cohabitant sleep in the same room, that "the construction of the outward appearance clause by the court below rests exclusively on this testimony." Similarly, it is simply false and deceptive for the wife to state that the court focused "exclusively" on the wife's "intimate conduct within the privacy of her own home." (Petitioner's Brief at 28)

Since the decisions of the courts below rested on testimony regarding the public and outward signs of a marital relationship,

rather than the nature of her private relationship, the wife has failed to show the most basic element in her claim--a violation of her privacy. See Paul v. Davis, 424 U.S. 693 (1976) (declining to extend right of privacy to claim based on publication of public facts). Moreover, she has failed to demonstrate any governmental intrusion into her privacy, since the issue arose from the enforcement of a contract provision to which she freely consented. In other words, the decision of the Massachusetts court simply gave effect to an agreement to which the wife was a party in drafting. The cases cited by the wife in support of her position, such as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973), are all inapposite to her argument. Each of these

cases involved a state statute unilaterally prohibiting conduct or an activity which touched on the intimate affairs of individuals. No case from this court has gone so far as to suggest that the right of privacy prevents a court from using public facts in interpreting and enforcing a specific provision of an agreement reached freely between two parties. Cf. Paul v. Davis, supra.

The wife spends much of her brief discussing statutes and decisions from other states in an attempt to show the national significance of this case. (Petitioner's Brief at 29-34) However, the wife ignores the fact that the cases and statutes have absolutely no relevance to the issue decided by the Massachusetts courts, since they do not involve separation agreements which spe-

cifically call for termination of alimony upon the wife's entering into a relationship with the outward appearance of marriage. While some may argue that in the absence of such an agreement it would be a violation of privacy for the state independently to inquire into the living arrangements of a recipient of alimony, that is not the issue in this case and thus it cannot now be decided by this Court.

The wife has further attempted to make an equal protection claim, apparently arguing that because many states have statutes which create an "arbitrary classification wholly without rational basis," this Court must step in to place limits on the courts and legislatures. (Petitioner's Brief at 31-33) Again, it must be stressed that no state legislation was involved in this case, and the rulings

below turned on the particular language of the agreement between the parties. Thus, any alleged "classification" of the wife was entirely rational, and the wife cannot claim to be similarly situated to other individuals who have their alimony terminated in the absence of an express separation agreement provision calling for such termination upon the fulfillment of certain contingencies. It is a fundamental tenet of constitutional law that a victim of discrimination under the equal protection clause must show that he or she has been arbitrarily treated differently than others who are similarly situated. New Orleans v. Dukes, 427 U.S. 297 (1976); Rinaldi v. Yeager, 384 U.S. 305 (1966). As Justice Frankfurter wrote:

> The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.

Tigner v. Texas, 310 U.S. 141, 147 (1940).

In this case the wife chose to enter

into a separation agreement which called for the termination of alimony under particular circumstances, thus differentiating herself from other spouses who did not enter into any such agreements. She has not shown that a Massachusetts court would have terminated her alimony in the absence of such an agreement. Thus, she cannot now claim that she falls within a classification of others from whom she can easily be distinguished. She chose to enter into the contractual provision, and now she must abide by it even though it has proved to have been disadvantageous to her. As this Court has said in a different context:

> Equal protection does not free those who made a bad assessment of risks or a bad choice from the consequences of their decision.

Corbitt v. New Jersey, 439 U.S. 212, 226 (1978).

## CONCLUSION

Unhappy with the lower courts' interpretation of the parties' separation agreement and ruling on the evidence, the wife has belatedly argued some insubstantial constitutional claims to get one more chance for a favorable ruling. For all of the reasons set forth above, the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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